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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

LEWIS COHEN,

Petitioner,

vs.

THE STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

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PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin entered on May 10, 1966.

CITATIONS TO OPINIONS BELOW

The official report of the opinion in the Supreme Court of the State of Wisconsin is reported in *State of Wisconsin* v. *Lewis Cohen,* 31 Wis. (2d) 97; 142 N.W. (2d) 161.

(Appendix A). The opinion of the Circuit Court of Milwaukee County, Criminal Division, the trial court herein, is set forth in the certified record filed herein on pages 101-105 of printed record.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin affirming the trial court was entered on May 10, 1966. (Appendix A). Rehearing was denied on July 1, 1966. (Record, page 221). The federal questions sought to be reviewed herein were raised at the time of the rehearing herein. See pages 228 and 229 of supplemental return of record.

QUESTION PRESENTED FOR REVIEW

Whether the petitioner was denied due process and a fair trial when the Supreme Court of the State of Wisconsin affirmed his conviction in the court below, without a jury, of the crime of abortion upon evidence that involves a reasonable doubt as a matter of law as to his guilt.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendment V of the United States Constitution:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Amendment VI of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV of the United States Constitution:

Section 1 . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes, 1963:

Section 940.04(1) ABORTION (Appendix B)

STATEMENT OF CASE

This action was commenced by the issuance of a warrant and a complaint against the petitioner in October, 1963, followed by the filing of an Information by the District Attorney for Milwaukee County charging the petitioner with a violation of Section 940.04(1). (Appendix B). The case was brought to trial in the Circuit Court of Milwaukee County, Criminal Division, without a jury, on March 3, 1965 and after several lengthy delays the testimony was concluded on September 10, 1965. The petitioner was found guilty and sentenced to two years at the State Prison at Waupun by the trial judge acting as trier of the facts on October 27, 1965. The petitioner made a timely appeal to the Supreme Court of the State of Wisconsin which rendered its opinion on May 1, 1966 confirming the judgment of the court below. (Appendix A). The petitioner made a timely motion for rehearing and upon such motion for rehearing raised the federal questions of denial of due process and a fair trial to the petitioner as petitioner

contends is apparent from the opinion of the Supreme Court of the State of Wisconsin. (Appendix A). The motion for rehearing was denied on July 1, 1966.

THE EVIDENCE

The petitioner was a 71 year old licensed, practicing physician in Milwaukee, Wisconsin. Patricia Hanley, the woman involved came by railroad to Milwaukee from her home in Minneapolis with a woman companion and went to the doctor's office on April 20, 1963, the first and only time the petitioner saw her.

The petitioner testified that Miss Hanley came to Milwaukee because she did not want to go to a hospital in Minneapolis because of embarrassment with her family. He made a vaginal examination and found there were some blood clots and bleeding and that she was pregnant one to two months. The petitioner testified he recommended that she have a curettment by another doctor and that she be hospitalized. He testified that when he saw her an abortion was already underway.

Miss Hanley admitted at the trial that when she learned she was pregnant she wanted an abortion and that she made efforts of her own in Minneapolis to bring about an abortion before she came to Milwaukee. She testified, however, in behalf of the State that she came to Milwaukee to have an abortion performed by the petitioner.

There was a large amount of conflicting evidence in the case tending to affect the credibility of both the petitioner and also Miss Hanley and her girl companion who came to Milwaukee with her.

There were, however, a series of uncontradicted physical and medical facts which were put to the only two gyne-

cologists who testified in the case. Both gynecologists testified that in their opinion Miss Hanley was already aborting when she came to Milwaukee and also that if the petitioner had performed the acts upon her without an anesthetic to which she testified, she would have been in great pain and would have substantial and continuous vaginal bleeding immediately thereafter.

While Miss Hanley testified at the trial that she was not bleeding before she came to Milwaukee she gave a statement to the District Attorney before the trial when she was seeking to inculpate the petitioner that she was bleeding before she came to Milwaukee. She admitted at the trial that she had made the prior self-contradiction but neither she nor the prosecutor nor the trier of facts elicited any testimony from her as to why she made the prior self-contradiction of her trial testimony on the main point at issue in the trial, to wit: that she was bleeding vaginally before she came to the petitioner's office.

The uncontradicted physical and medical facts are set forth in the hypothetical question put to the two gynecologists in Appendix C. The unexplained prior self-contradictions of Miss Hanley are set forth in Appendix D.

REASONS FOR GRANTING WRIT

1. The difficulty of the proof of the crime of abortion and the greater difficulty of the defense against it is essentially the same as with regard to the crime of rape. The Courts have repeatedly approved Sir Matthew Hale's statements with respect to the crime of rape that "it must be remembered, that it is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent;" and that we should "be the more cautious upon trials of offenses of this nature, wherein the Courts and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are overhastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses." See *Cahill* v. *State,* 178 P. (2d) 657, p. 664 (1947).

2. The opinion of Justice Gordon of the Wisconsin Supreme Court (Appendix A) correctly aligns all of the *other* conflicting evidence in the case but he finally bases his decision upon the credibility of Miss Hanley as to whether she was bleeding before she went to the petitioner's office. (Emphasis supplied)

> "It is our opinion that conflicting evidence was presented to the trier of fact as to whether Miss Hanley had been bleeding before she went in to see the doctor and also as to whether there were blood clots formed prior to such visit. The version of the facts alleged by the appellant was sufficiently controverted so as to leave it peculiarly within the scope of the trial court whether to believe it or to disbelieve it." (Appendix, p. 218).

3. But Miss Hanley had stated to the prosecutor in the case in a statement made to him shortly before the trial: *"Well, I was bleeding before I went but I went in for the purpose of an abortion."* She admitted at the trial that she had so told the prosecutor. During the trial the prosecution did not ask for any explanation as to why she had made such a statement to him. It was the State's burden to prove every element in the case and to remove the prior self-contradiction or at least offer some explanation for it if it was possible for them so to do. But her position on the crucial point in the case was flatly contradicted and unexplainedly so by her prior statement to the prosecutor. (Emphasis supplied)

In *Wigmore,* Vol. III, 3rd Edition, Section 1018, page 686, it is stated:

> "Chief Baron Gilbert, Evidence, 147-150: 'Another thing that derogates from the credit of the witnesses, if upon oath he affirmed directly contrary to what he asserts; . . . and this *takes from the witness all credibility,* inasmuch as contraries can not be true . . . now that which sets aside his credit and overthrows his testimony is . . . the repugnancy of his evidence; if what he says be contradictory, that removes from him all credit; for things totally opposite can not receive belief from the attestation of any man." (Emphasis supplied).

Further in *Wigmore, supra,* Section 1018, page 687:

> "(a) Since, in the words of Chief Baron Gilbert, it is the 'repugnancy of his evidence' that discredits him, obviously the Prior Self-Contradiction is not used assertively; *i.e.,* we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradiction by other witnesses). We simply set the two against the other, perceive that both can not be correct, and immediately conclude that he has

> erred in one or the other but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one; the one merely neutralizes the other as a trustworthy one." See also *Wigmore, supra,* Section 902, page 392.

The trial court in Milwaukee erroneously, we contend, based its decision upon its conclusion "that the credibility of the chief witness for the State (Miss Hanley) is of the highest caliber." (Appendix, page 102) Justice Gordon rested his decision on the credibility of Miss Hanley. If her credibility on the crucial issue in the case is removed we respectfully contend that the whole case of the State falls. There would then be no credible evidence to prove her condition before she visited the petitioner and it is incumbent upon the State to prove what her condition was at that time.

4. In *Tot* v. *U. S.,* 319 U.S. 463, 473 (1943), this court stated:

> " . . . where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course, constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance can not be sustained."

This court stated in *Mooney* v. *Holohan,* 294 U.S. 103, 112 (1934):

> "That requirements (of due process) in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of all civil and political institutions."

In *Brooks, et al.* v. *U. S.*, 164 Fed. R. (2d) 142 (C.C.A. 5th Cir., Ga., 1947) it is stated:

> " . . . due process as to each defendant required for conviction that the evidence be strong enough to exclude every other reasonable hypothesis than the guilt of the defendant."

In *Lisemba* v. *California,* 314 U.S. 219 (1941) this court said:

> "The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence whether true or false."

In *Speiser* v. *Randall,* 357 U.S. 513, 529 (1958) this court said: "Due process requires the State to convict only upon sufficient proof."

In *Asaro* v. *Parisi,* 297 Fed. 2nd 859, 863-4 (C.C.A. 1st Cir., Mass., 1962) it was said:

> ". . . practical men and women jurors would almost inevitably . . . act upon the assumption that what a witness may have said soon after an event is far more likely to be accurate than what the witness might subsequently say, even in the court under oath."

For the above reasons we respectfully contend that the petitioner was convicted without benefit of the rule of reasonable doubt in criminal cases and therefore deprived of due process and of a fair trial in violation of his constitutional rights and that therefore a Writ should issue to the Supreme Court of the State of Wisconsin.

Respectfully submitted,

CHARLES J. KERSTEN
Attorney for Petitioner

APPENDIX A

No. St. 92
August Term, 1965

STATE OF WISCONSIN: IN SUPREME COURT

State of Wisconsin,

Respondent

v.

Lewis Cohen,

Appellant

APPEAL from a judgment of the circuit court for Milwaukee county:

HERBERT J. STEFFES, Circuit Judge. *Affirmed.*

The appellant, Lewis Cohen, M.D., was convicted on October 27, 1965, following a trial to the court, of criminal abortion in violation of sec. 940.04(1), Stats., and sentenced to a term of two years' imprisonment. The defendant waived being tried before a jury.

The facts will be recited in the opinion.

Statute Involved.

"940.04 Abortion. (1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both."

GORDON, J.

A Review of the Evidence.

Since the appellant has challenged the sufficiency of the evidence, it becomes necessary that we review the evidence. The intrinsic nature of the case forecloses any great delicacy.

On April 12, 1963, Patricia Hanley, an eighteen-year-old, unmarried resident of Minneapolis, was informed by her physician that she was pregnant. Patricia told her friend, Roberta Dahl, of her condition and of her desire to have a miscarriage. Pursuant to Roberta's suggestion, Patricia took some quinine pills and a mustard bath in an attempt to cause a miscarriage.

Patricia testified that on April 16 or 17, 1963, Roberta telephoned the defendant, Dr. Cohen, from the Dahl home and made arrangements for a visit with him in Milwaukee. She said that she and Roberta arrived at Dr. Cohen's office at about 8 a.m. on April 20, 1963, and that she then paid Dr. Cohen $400 upon his request.

Patricia further testified that she went into an examining room, removed her clothing except for a half slip, and positioned herself on her back upon a table. She stated that Dr. Cohen inserted some medical instruments into her body and she experienced internal pain and a pulling sensation in the vagina. Patricia claimed that the doctor told her he was having some trouble "getting parts of it out."

The procedure in the doctor's office lasted about forty-five minutes; Miss Hanley stated that thereafter Dr. Cohen gave her a supply of ergot tablets to stop any bleeding. She said that she thought she put on a pad after the treatment and prior to leaving the doctor's office. The two women then took a bus back to their hotel, rested for about an hour and a half and then returned to Minneapolis by train.

Patricia stated that her supply of ergot pills ran out four or five days after leaving Milwaukee and that she began to bleed in small amounts. She said that on May 5, 1963, she began to hemorrhage and evacuated some blood

clots. She explained that when this occurred again on May 15th she was prompted to call Dr. Cohen, who told her to purchase some ergot pills and also advised her to consult her family physician.

Patricia entered Minneapolis General Hospital on May 15, 1963, and remained there until May 17, 1963, under the care of Dr. Donald Johnson, whom she told about the prior events at the defendant's office. Dr. Johnson testified that he diagnosed her condition as an incomplete abortion; he performed a uterine curettage, removing several fragments of placental tissue.

Miss Hanley testified that on May 17, 1963, she signed a statement at the Minneapolis police department detailing her involvement with Dr. Cohen. Milwaukee authorities were informed of the transaction, and on June 6, 1963, an investigator in the Milwaukee county district attorney's office transmitted the complaint to the appellant.

Miss Hanley said that on the following day, June 7, 1963, she received a telephone call from Attorney Donald Jacobson, representing Dr. Cohen, who asked her to meet him at the Milwaukee Road depot in Minneapolis. Patricia added that she and Roberta went to the depot and met with Mr. Jacobson, who advised her that if she wrote a letter to the Milwaukee authorities exculpating Dr. Cohen, the case would probably be dropped and Patricia could avoid any publicity and thereby protect the boy involved. Patricia testified that she told Mr. Jacobson that her statement to the Minneapolis police was truthful, but she nevertheless consented to write the letter (Exhibit 4), which she said was designed to have the case dropped.

Patricia said that after the letter was written Mr. Jacobson gave her $400, although he had not previously mentioned money as an inducement. She acknowledged that

Mr. Jacobson did not threaten her and that he "was a gentleman at all times." Patricia stated that she later received $72 from Mr. Jacobson to cover her hospital bill. At the trial, Miss Hanley stated that the contents of the letter (Exhibit 4) were not true.

On June 23, 1963, Patricia gave a statement to Mr. Hugh O'Connell, of the Milwaukee county district attorney's office, in which she repeated her inculpation of Dr. Cohen. This statement contained assertions regarding her bleeding before seeing Dr. Cohen and regarding the latter's comments about blood clots. These aspects of the evidence will be considered more closaly in a subsequent portion of this opinion.

Dr. Cohen testified that he had known Ann Dahl, Roberta's mother, for about two years prior to April, 1963, having once treated her. He further stated that Mrs. Dahl had sent people with social diseases to him on numerous occasions, and that in March, 1963, she had brought her daughter, Roberta, to Dr. Cohen to determine if Roberta was pregnant.

Dr. Cohen stated that Mrs. Dahl telephoned him on April 18 or 19, 1963, and told him that her daughter's friend, Patricia Hanley, "was pregnant, that she had taken quinine pills, hot mustard baths, and she began to hemorrhage and [was] flowing very heavy." Dr. Cohen testified that he advised Mrs. Dahl to take the girl to a local hospital but that Mrs. Dahl pleaded with him to be merciful and to treat her to prevent her parents from discovering her pregnancy. According to Dr. Cohen, he told Mrs. Dahl that he would take care of her but could not perform any operation if such was necessary.

The appellant testified that Patricia and Roberta arrived at his office on the morning of April 20, 1963, and that Patricia advised him that she had started bleeding about

six days before coming to Milwaukee, that Mrs. Dahl had advised her to take quinine pills, that she had had very strong cramps and pain, that she had begun to bleed very heavily after taking the pills, and that she had passed blood clots prior to seeing him.

Dr. Cohen stated that upon examining Patricia, he noticed blood clots in the lower part of her vagina, which he cleaned out with a forceps. He also claims to have observed a piece of necrotic tissue protruding from the cervical canal and discovered that Patricia had a retroverted uterus which caused pain when pressed forward. He stated that he told Patricia that she had had an incomplete miscarriage and that in order to get relief she would have to go to the hospital and have a curettment. He advised her that it would cost between $600 and $700, whereupon he said Patricia gave him $400 and asked him to make the necessary arrangements and said that she would return with the rest of the money.

Dr. Cohen testified that the next time he heard anything about Miss Hanley was on June 6, 1963, when the district attorney's investigator apprised him of the abortion charge. The appellant stated that upon being informed of Miss Hanley's complaints he retained Mr. Jacobson to safeguard his interests and to return the $400.

The Hypothetical Questions.

The defendant claims that his conviction was erroneous because the evidence shows that Miss Hanley was already in the process of aborting when she first met with him. In support of his contention, the defendant relies upon his own testimony, upon certain evidence given by Miss Hanley, and upon the opinions of two Milwaukee gynecologists, Dr. Alvin Kurzon and Dr. Richard Mattingly.

The two medical doctors, in response to hypothetical questions, concluded that Miss Hanley was in "some phase of miscarriage" or "in the process of an inevitable or imminent abortion." Such opinions were clearly based upon the hypothesis that she had been bleeding and that there were blood clots in her vagina prior to her visit to the defendant's office.

Dr. Mattingly, upon inquiry by Judge Steffes, testified that the amount of bleeding and the existence of blood clots would be the significant factor upon which he would base his opinion regarding the inevitability of the miscarriage. He also testified that the taking of ergot pills would cause the uterus to contract, thereby restricting the amount of bleeding. Dr. Mattingly further stated that the prior taking of quinine pills and a mustard bath would have no significance or relevancy.

The trial court rejected the defendant's testimony as untrue and untrustworthy. Accordingly, it is crucial to the success of the appellant's argument that the opinions of the medical doctors were based on facts which were competently established by testimony other than that of Dr. Cohen.

To prove the truth of his contention that Miss Hanley had in fact been bleeding before she visited the doctor's office, the appellant points to the statement that Miss Hanley had given to Mr. O'Connell on June 23, 1963, which contains the following:

"Well, I was bleeding before I went but I went in for the purpose of an abortion."

At the trial, however, Miss Hanley contradicted the foregoing statement and testified that she had not been bleeding previously.

In the same statement given on June 23, 1963, Miss Hanley was asked what Dr. Cohen had told her would happen at his office, and she replied, "He said that he would remove certain clots that had already formed and would try to remove the rest." This answer, however, was crossed out, and the following words were written in after the answer and initialed by Miss Hanley: "This answer was untrue." At the trial she denied that Dr. Cohen had told her that he was going to remove clots that had already formed.

It is our opinion that conflicting evidence was presented to the trier of fact as to whether Miss Hanley had been bleeding before she went in to see the doctor and also as to whether there were blood clots formed prior to such visit. The version of the facts urged by the appellant was sufficiently controverted so as to leave it peculiarly within the scope of the trial court whether to believe it or to disbelieve it.

The failure to give credence to the medical opinions would necessarily follow if the lower court did not believe the essential facts assumed in the hypothetical questions. The total dependence of such opinions upon the validity of the facts assumed in the hypothetical questions was clearly stated by this court in *Kreyer* v. *Farmers' Co-operative Lumber Co.* (1962), 18 Wis. (2d) 67, 77, 117 N.W. (2d) 646:

> "The purpose of a hypothetical question is to give the jury the benefit of an expert opinion upon one or another of several situations which may be found to exist in the evidence. The key point in a hypothetical question is the facts that are assumed and form the premises. If these facts fail in any important particular then necessarily the answer or conclusion that assumes the facts must fail."

Additional cases in which this court has pointed out that an infirmity in the hypothesis attaches to the answer founded upon it are *McGaw* v. *Wassmann* (1953), 263 Wis. 486, 492, 57 N.W. (2d) 920, 58 N.W. (2d) 663; *State* v. *Timm* (1944), 244 Wis. 508, 515, 12 N.W. (2d) 670; *Will of McGovern* (1942), 241 Wis. 99, 107, 108, 3 N.W. (2d) 717.

Other Claimed Exculpating Factors.

The appellant points to a number of other circumstances which, it is urged, demonstrate that there must be a reasonable doubt that Dr. Cohen did in fact perform an abortion. Miss Hanley was not given an anesthetic at the time she was in Dr. Cohen's office, and it is claimed that this is inconsistent with a planned abortion. This fact is pressed particularly in light of the contention that she did not complain of great pain at the time of the events in the doctor's office. However, she testified that she did endure pain, and we do not find impressive the contention that the absence of either an anesthetic or excruciating pain must necessarily outweigh the other evidence that an abortion was performed.

Reference is also made by the appellant to the fact that a few minutes after she dressed herself and left Dr. Cohen's examining room Miss Hanley walked out of his office, unaided, and took a bus back to her hotel. After resting for only an hour and a half at the hotel, she returned by train to Minneapolis. It is contended that this amount of movement by her within such a short time after the alleged abortion would have been accompanied by great discomfort and profuse bleeding. It is the appellant's claim that her extensive movements and the absence of bleeding demonstrate that an abortion did not actually occur. On the other hand, the record discloses that the doctor gave Miss Hanley ergot pills to check the bleeding, and further it appears that she wore a pad.

When Miss Hanley telephoned Dr. Cohen from Minneapolis a few weeks after visiting his office and advised him that she was hemorrhaging, she was told by Dr. Cohen to consult her family physician. It is the appellant's contention that this advice was inconsistent with a guilty mind and suggests Dr. Cohen's innocence. The trial court was entitled to evaluate the significance of this testimony and may well have concluded that it was either a desperation move on the part of the defendant or it may have reflected his confidence that Miss Hanley would not want to get "involved" with a criminal prosecution. We recognize that we are speculating on the impact of this testimony upon the trial court, but we are persuaded that it is not of such significance as to warrant a reversal.

Conclusion.

In our opinion, the defendant's guilt or innocence depended on the credibility of the witnesses. If Dr. Cohen's testimony had been believed, a different result would irresistibly have followed. However, the trial court gauged his credibility "at the very lowest degree" and added, with reference to Dr. Cohen's testimony, that "the air was figuratively pungent with the acrid fumes of perjury."

The appraisal of the relative credibility of the several witnesses was a proper function of the trial court and one which this court finds no basis for upsetting. *Drane* v. *State* (1965), 29 Wis. (2d) 208, 211, 138 N.W. (2d) 273; *Gauthier* v. *State* (1965), 28 Wis. (2d) 412, 417, 137 N.W. (2d) 101.

By the Court. — JUDGMENT AFFIRMED.

APPENDIX B

Wisconsin Statutes, 1963:

Section 940.04(1) ABORTION. Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

APPENDIX C

UNCONTRADICTED PHYSICAL AND MEDICAL FACTS WHICH WERE PUT TO THE ONLY TWO GYNECOLOGISTS WHO TESTIFIED IN THE CASE.

1. Expert opinion of Dr. Alvin M. Kurzon, diplomate of the American Board of Obstetrics and Gynecology practicing in Milwaukee, Wisconsin:

* * *

(printed Record pp. 175-177)

Q. Now, that last assumption, which is a repetition of my previous lengthy hypothetical question, I will ask you to delete from your consideration at the moment, but I will ask you to assume or take all of the additional assumptions that I put in the question, and in order that there be no mistake about it, I will repeat the assumptions that I wish you to keep in mind, deleting the first one—now, these are the ones I will ask you to assume:

That the girl's last menstrual period was February 26, 1963, and that she missed her menses for the following month of March;

Next, that three Prostigmin shots were given to her and a test made to determine pregnancy about April 10, 1963, the results of which were positive for pregnancy;

That the girl thereupon determined to bring about an abortion of her pregnancy;

That the girl, pursuant thereto, took a number of quinine pills and a mustard bath to induce an abortion;

Next, that during this period she had cramps;

Next, that on April 19 and 20 she took a long train ride from Minneapolis to Milwaukee;

Next, that she was bleeding before she came to the doctor's office on April 20th;

Next, that she had blood clots in her vagina that had already formed before she came to the doctor's office;

Next, that she was given no anesthetic during any of the time that she was in the doctor's office and did not cry out or experience any appreciable pain during that time;

Next, that after the doctor finished with her she was not bleeding very much and she had no padding or packing on her, nor did the doctor suggest the same;

Next, that immediately thereafter, without difficulty or assistance, she dressed herself, walked down the stairs onto the street, took a bus to the Schroeder Hotel and, thereafter, a train ride back to Minneapolis;

Now, having in mind just those last enumerated assumptions, would that change your opinion as to her condition before—just before she came to the doctor's office?

A. No, my opinion would remain the same. (See printed Record p. 174) (The presence of blood in the vagina in a female in which a diagnosis of pregnancy had previously been substantiated, would to me indicate that an abnormal situation was in progress; that this abnormal situation was related to the pregnancy; and that the probable cause of this abnormal condition was some phase of a miscarriage.)

Q. Doctor, if a person—a pregnant woman, as described in my question, the length of pregnancy and the same age—if instruments are introduced into her uterus and the cervix is not dilated in any way, but the pregnancy is intact, and a portion of the contents of the uterus are extracted, a substantial portion, what can you say about the probabilities and usual reaction of a person from such a procedure—first, with regard to pain?

* * *

Q. Did you understand the question? Will you state what the usual reaction in such a person is in regard to pain, without any anesthetic and with an undilated cervix?

A. In accomplishing that which you have described, the patient would have a considerable amount of pain and discomfort. Secondly, this would be attended with a considerable amount of blood loss. Thirdly, following the completion of this, as you described, it would be my judgment that bleeding would continue."

2. Expert opinion of Dr. Richard F. Mattingly, Professor and Chairman of the Department of Gynecology and Obstetrics of Marquette University School of Medicine and Director of the Department at the Milwaukee County

Hospital and also a diplomate of the American Board of Obstetrics and Gynecology:

(see printed Record, pp. 180-183)

"Q. Now, Doctor, I will ask you another question —I will ask you to delete the first assumption that I gave to you, but I will ask you, however, to keep in mind and assume all the subsequent assumptions after the first, and I will repeat those so that there will be no misunderstanding in that regard, and I will ask you to assume these facts:

That the girl's last menstrual period was February 26, 1963, and that she missed her menses for the following month of March;

Next, that three Prostigmin shots were given her and a test made to determine pregnancy about April 10, 1963, the results of which were positive for pregnancy;

Next, that the girl thereupon determined to bring about an abortion of her pregnancy;

Next, that the girl pursuant thereto, took a number of quinine pills and a mustard bath to induce an abortion;

Next, that during this period she had cramps;

Next, that on April 19 and 20 she took a ride on a train from Minneapolis to Milwaukee;

Next, that she was bleeding excessively from the vagina before she came to the doctor's office on April 20;

Next, that she had blood clots in her vagina that had already formed before she came to the doctor's office;

Next, that she is given no anesthetic during any of the time that she is in the doctor's office and does not cry out or experience any appreciable pain during that time;

Next, that after the doctor finished with her she was not bleeding very much and she had no padding or packing on her nor did the doctor suggest the same;

Next, that immediately thereafter, without difficulty or assistance, she dressed herself, walked down the stairs out onto the street, took a bus to the Schroeder Hotel and, thereafter, a train ride back to Minneapolis;

Now, Doctor, based on those enumerated assumptions, will you state whether or not you have an opinion, based upon a reasonable degree of medical probability, as to the condition of her pregnancy at and immediately prior to her visit to the doctor's office on April 20?

A. Yes, I believe I could render an opinion.

Q. And what is that opinion?

A. In the event that all of these facts exist and that the patient was pregnant, and that there was a significant degree of bleeding from the cervix—from the vagina—this patient would still be classified as in the process of an inevitable abortion and this would be related to the amount of bleeding that occurred.

Q. Doctor, if a person, such as a doctor, entered into the uterus through the cervix of a female who was about two months or a little less pregnant, and the pregnancy is intact, that is, there is no dilation of the cervix, and a substantial part—let us say—well, let us say a substantial part of the contents of the uterus

are removed, but there is left in the uterus, also, a substantial part of its contents, what can you say about the usual and probable reactions or results of such an operation with respect to the sensation of pain on the part of the woman?

A. I believe it would be quite painful in an undilated cervix in an 18-year-old patient, who has had no previous child.

* * *

Q. Having in mind the same facts, having in mind that a substantial part had been removed, and a substantial part remains in the uterus, what is the usual, probable result immediately thereafter with respect to bleeding?

A. If only a portion of the product of conception has been removed, there would be unquestionably continued bleeding from this placental site.

Q. Of what character?

A. I believe the patient would hemorrhage and continue to hemorrhage until this was removed.

Q. And what is the usual, probable course of bleeding so far as duration is concerned, under those circumstances, a few days or longer?

A. This would be initiated immediately by an interruption of part of the placenta and would continue until the placenta would be completely separated—so one would have, in essence, most likely, an immediate source of bleeding, which would continue."

APPENDIX D

UNEXPLAINED PRIOR SELF-CONTRADICTIONS OF MISS HANLEY, THE ONLY WITNESS FOR THE PROSECUTION ON THE MAIN ISSUE; PRIOR BLEEDING.

(See printed Record, pp. 128, 129)

"Q. Now, excuse my somewhat embarrassing question, but, Patricia, it is true, is it not, that when you went to the toilet, prior to the time you came down to Milwaukee, that you noticed some small blood cots?

A. No.

Q. Pardon?

A. No.

Q. Did you notice some large blood clots?

A. No.

Q. You say 'no'. You were bleeding, however, before you came to Milwaukee, were you not?

A. I was not bleeding.

Q. You were not, you say?

A. I was not.

Q. Now, Miss Hanley, I want to call your attention to an answer you made on page 8 and I want to show it to you so you will see exactly what I have in mind—page 8, two thirds down.

The Court: Still Exhibit B?

Mr. Kersten: Exhibit B.

'Q. Now, with regard to what he told you to say in your letter, that was not the truth, was it?

A. Well, I was bleeding before I went, but I went in for the purpose of an abortion.'

Q. That's the answer you made on that occasion is it not?

A. Yes."

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 594

LEWIS COHEN,

Petitioner,

vs.

THE STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRONSON C. LA FOLLETTE
Attorney General

BUGLE R. GOODNELL
District Attorney
Milwaukee County

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Respondent opposes the granting of a writ of certiorari on the ground that no substantial federal question is presented, the sole question being the sufficiency of the evidence to sustain the conviction, questions of credibility having been resolved by the state trial court.

QUESTION PRESENTED FOR REVIEW

Whether any question of a denial of due process of law under the provisions of the Fourteenth Amendment of the United States Constitution was presented to the Supreme Court of the State of Wisconsin on appeal or was involved in any manner in the opinion of that court affirming the conviction of the defendant.

STATEMENT OF THE CASE

On April 2, 1963, Patricia Hanley, an unmarried girl, 18 years of age, residing in Minneapolis, Minnesota, consulted a physician in that city, one Dr. Elsie Riordan. Patricia advised Dr. Riordan that she had failed to have a menstrual period since February 1963 and suspected that she was pregnant. Dr. Riordan examined Patricia and administered a standard pregnancy test over a three-day period. This test consisted of three injections of prostigmin, a drug which produces the menstral flow, as a rule, if the patient is not pregnant. Patricia did not respond to the drug and Dr. Riordan arranged a frog test for her at the Lufkin Laboratory in Minneapolis in order to definitely diagnose Miss Hanley's condition. On April 12, 1963, the frog test was had and the results showed Patricia to be pregnant.

From the time Patricia first suspected her condition, she had discussed her problem with Roberta Dahl, an 18-year-old girl who had been her classmate in high school and was her close friend. Patricia told Roberta that she was desirous of having a miscarriage and Roberta suggested quinine pills and a mustard bath. Patricia acted on those suggestions but to no avail. Subsequently Roberta Dahl advised her of a physician in Milwaukee, Wisconsin, who would perform an abortion for $400. Roberta indicated that the doctor had performed such an operation on her in March of 1963. Roberta Dahl testified regarding the specifics of that operation. On April 16 or 17, 1963, the girls placed a telephone call from the Dahl home in Minneapolis to the defendant-petitioner, hereinafter referred to as the defendant, in Milwaukee. Miss Dahl told the de-

fendant that she had a friend who needed help and it was arranged that the two girls would go to Milwaukee.

On April 19, 1963, Patricia Hanley and Roberta Dahl met in the early evening, had dinner, and left Minneapolis by train at approximately 7:30 p. m., arriving in Milwaukee at approximately 3:30 a. m. on April 20, 1963. They proceeded to the Schroeder Hotel, registered and went to bed. Patricia Hanley had with her approximately $500 in cash. On the morning of April 20, 1963, the girls proceeded to the defendant's office, arriving there at approximately 8:00 a. m. The defendant was there and was introduced to Patricia Hanley. A conversation between Patricia and the defendant in the presence of Roberta Dahl ensued regarding how long Patricia had been pregnant. Defendant then requested the money and Paticia gave him $400.

Defendant then advised that he would perform a "curettment, scraping of the uterus and take the fetus by that means." The defendant and Patricia then entered an inner room. Patricia removed all of her closing except a half slip and, pursuant to the defendant's instruction, lay on her back upon a table, inserted her feet in stirrups to elevate her legs which were then spread about two feet apart. Defendant then inserted some instruments into her body and she experienced internal pain and a pulling sensation in the vagina. The defendant mentioned "* * * he was having some trouble, that he couldn't get parts of it out." The operation took approximately 45 minutes, after which Patricia vomited and experienced some dizziness.

Patricia then dressed and rejoined Miss Dahl. The defendant gave her sixteen to eighteen pills, ergot tablets, and advised her they would work to stop any bleeding she might

have. The defendant gave the girls instructions as to bus connections from his office to the Schroeder Hotel and the girls left his office. They returned to the Schoeder Hotel, arriving there at approximately 9:30 a. m. They rested until approximately 11:00 a. m., checked out of the hotel, and returned to Minneapolis by train.

When the supply of ergot tablets ran out four or five days after Patricia Hanley left Milwaukee, she began to experience some bleeding. On May 5, 1963, and again on May 15, 1963, she hemorrhaged. On May 15, 1963, she telephoned the defendant from the Dahl home and advised him of her condition. He told her to obtain some more ergot and to consult her family physician. She was reluctant. However, he indicated there was nothing else he could do for her. On that day Patricia Hanley was admitted to the Minneapolis General Hospital where she remained through May 17, 1963. The treating physician, Dr. Donald Johnson, diagnosed her condition as an incomplete abortion and performed a uterine curettage. Dr. Johnson's clinical records reflected that Patricia's last menstrual period was February 26, 1963, that she missed her menses in March and ten days before May 15, 1963, she began bleeding which persisted intermittently to May 15, 1963. Dr. Johnson removed several fragments of placental tissue when he performed the uterine curettage. His indications for operation reflected that Miss Hanley had signs and symptoms of pregnancy and there apparently were attempts of criminal interference some four weeks before May 15, 1963, with a metal instrument of some kind.

When Patricia Hanley was discharged from the hospital on May 17, 1963, she was taken to the Minneapolis

Police Department and subsequently she and Roberta Dahl detailed their involvement with the defendant. Milwaukee authorities were advised and on June 6, 1963, Mr. Ray Demski, an investigator in the Milwaukee County District Attorney's Office, called upon the defendant in Milwaukee and inquired regarding the abortion complaints received from both Patricia Hanley and Roberta Dahl.

At that time the defendant stated that the two girls had come to his office in the middle of April 1963 and one of them was hemorrhaging; that he examined her and discovered a heavy blood clot; that he removed the blood clot and advised her to go to the hospital for treatment; that she advised him she was flying home and would see a doctor in Minneapolis; that he asked her the cause of the miscarriage and she indicated her boy friend had given her some quinine pills; that she didn't want to cause any trouble; that he gave her some ergot pills to stop the bleeding until she got home to visit a doctor and that about two weeks after that she had called him long distance stating she had taken his advice, gone to a hospital, and was then feeling fine.

On the following day, June 7, 1963, Patricia Hanley in Minneapolis received a long distance telephone call from Milwaukee from Attorney Donald Jacobson. Mr. Jacobson advised Patricia that he represented the defendant and asked her to meet him, Attorney Jacobson, at the Milwaukee Road depot in Minneapolis the following Sunday, indicating that it would be to Miss Hanley's advantage. Patricia agreed, and on the following Sunday, in the company of Roberta Dahl, she met with Mr. Jacobson at the depot. They went to the dining room and had breakfast. Although

the defendant accompanied Mr. Jacobson to Minneapolis, he remained outside the depot and did not converse with either Miss Hanley or Miss Dahl.

Mr. Jacobson asked Patricia if she would write a letter to the Milwaukee officials denying the allegations made to the Minneapolis Police Department, indicating that such a course of action would result in the authorities dropping the charges and avoid embarrassment for all. Patricia agreed, Mr. Jacobson purchased a tablet of paper and she wrote a letter dictated by Mr. Jacobson, which was then placed in an evelope, addressed, stamped and mailed to Mr. Demski, the investigator in Milwaukee. Mr. Jacobson then returned $400 to Patricia advising her that the defendant did not have to give the money back. Patricia inquired regarding the hospital bill for her treatment of May 15-17 in the amount of $72.00. Mr. Jacobson indicated that he would discuss that matter with the defendant and left. Subsequently Attorney Jacobson mailed a check in the amount of $72.00 to Roberta Dahl for Patricia Hanley's hospital bill.

On July 19, 1963, the defendant made a statement which was stenographically transcribed before Hugh R. O'Connell, the then Assistant District Attorney of Milwaukee County, Michael Curley, an investigator, and Attorneys Clarence Jacobson and Donald Jacobson. In that statement the defendant indicated that he knew Patricia Hanley; that he had met her in the month of May 1963; that he did not know how she initially made contact with him; that she and another girl were brought to his office by a third party; that she advised him of her name and that she was staying at the Schroeder Hotel; that she was

having pains and spotting; that she had missed a period and had taken quinine pills for a week; that he examined her and found blood clots and oozing of blood from the uterus and noticed that a piece of placenta was protruding from the cervix of the uterus; that he advised Miss Hanley that she was miscarrying and that she should go to a hospital in that he did not perform curettments or surgery of any kind and advised her to go to a hospital right away; that she asked him how much it would cost and he said between $500 and $600 and that she said, "I have only $400"; that he said, "I am afraid it will cost you that much"; that she said that she was going to take a plane to Minneapolis and get more money and would be back; that she left the $400 with him; that he didn't hear from her until about a week or two after that; that he gave her some ergot tablets so that she shouldn't hemorrhage; that a man had brought the two girls to him; that he did not know how they happened to come to see him; that he went with Attorney Jacobson to Minneapolis; that he did not see the girls at the depot; that he had told Mr. Jacobson that he felt he wasn't entitled to the money, the $400, and that someone had called him from Minneapolis, he thought it was Miss Hanley's mother, who advised him that "they had an agreement" with him and in case he didn't complete it, he should return the money; that he would have charged Miss Hanley a fee for services, but under the circumstances he didn't want to get into trouble; that afterwards Attorney Jacobson told him that Miss Hanley had asked for him to pay her hospital expenses and he did in order to avoid trouble.

In July of 1963 Roberta Dahl, then married, required hospitalization in Minneapolis for four days. In Septem-

ber of 1963 she sent a letter to Attorney Jacobson indicating that as a result of the abortion performed on her by the defendant in March of 1963, she had incurred damages in the amount of $2,300, requesting the payment of such a sum from the defendant.

The defendant testified on his own behalf. In brief, he denied performing the operation on Miss Hanley or the operation on Miss Dahl. He indicated that he had known Miss Dahl's mother, Mrs. Ann Dahl, since 1961, and since that time he had treated many patients sent to him by her for social diseases. He admitted that he had seen Roberta Dahl in March of 1963. However, he indicated that Mrs. Dahl brought her daughter to him and that Roberta had already miscarried; that she was experiencing difficulty since the miscarriage; that he examined her and discovered an infection which he treated, charging Mrs. Dahl $5.00. Further, he admitted that Roberta Dahl and Patricia Hanley had come to his office in April of 1963 in a taxi; that Roberta Dahl had introduced him to Patricia Hanley; that Patricia Hanley advised him she was pregnant and had been bleeding intermittently for about six days; that he examined her and noticed blood clots; that he removed the blood clots and did a bimanual examination of her uterus; that after examining her, he diagnosed her condition as an incomplete miscarriage; that he advised Patricia Hanley to go to a hospital and have a curettment because he did not perform surgery, indicating that most of the fetus and the placental tissue was already gone but that there was evidently some left in the womb; that she asked him to make the necessary arrangements and left the $400 for that purpose; that he indicated it would cost more than $400, probably $600 to $700; that

Miss Hanley indicated she would go back to Minneapolis, obtain the extra money, and return the next day; that the two girls left and the next thing he heard in the matter was in June when Mr. Demski came to his office; that Mr. Demski had suggested that the defendant obtain a document from Miss Hanley exonerating him; that pursuant to that suggestion he retained Attorney Donald Jacobson and accompanied him to Minneapolis.

Attorney Jacobson testified that he was retained by the defendant in June 1963 and advised by the defendant that Mr. Ray Demski, an investigator for the Milwaukee District Attorney's office, had contacted the defendant and indicated it would be desirable for the defendant to obtain a statement from Patricia Hanley. After discussing the matter with the defendant, Attorney Jacobson telephoned Patricia in Minneapolis and arranged a meeting for the following Sunday morning in the train depot in Minneapolis. He and the defendant proceeded to Minneapolis. However, only he met with Patricia Hanley and Roberta Dahl. The defendant traveled along merely for companionship and intentionally refrained from conferring with the girls. Attorney Jacobson discussed this matter with the girls and they advised him of the defendant's innocence of any illegal actions. He then inquired of Patricia Hanley to document the exoneration, she agreed and he purchased a pad of paper. The facts as related by the girls were summarized by Attorney Jacobson and returned to a written statement by Patricia. The statement was directed to Mr. Demski in Milwaukee and mailed. He then returned $400 to Patricia and she inquired regarding possible reimbursement of hospital expenses in the amount of $72.00. Attorney Jacobson advised that he would inquire of the de-

fendant regarding the possibility of repayment and departed, returning with the defendant to Milwaukee.

When advised regarding the $72.00 hospital expense incurred by Patricia Hanley, the defendant authorized Attorney Jacobson to forward the money to her. He then mailed a check in that amount to Roberta Dahl for delivery to Patricia Hanley. Some weeks later Mrs. Ann Dahl telephoned Attorney Jacobson advising him that she and her daughter Roberta were desirous of obtaining legal representation. Attorney Jacobson discussed that matter with the defendant and obtained authorization to retain legal counsel for Roberta Dahl at the defendant's expense. He then proceeded to Minneapolis, met with Mrs. Dahl and Roberta and retained Attorney Ronald Meshbecher of Minneapolis to represent Roberta, paying a retainer fee of $250 with the promise to pay an additional $250 "if certain work was necessary * * * or * * * performed."

Two physicians testified on the defendant's behalf, both concluding in response to hypothetical questions predicated upon the defendant's version of the events that Patricia Hanley had miscarried before she appeared in the defendant's office on April 20, 1963, and he did not cause the miscarriage.

Testimony and depositions were presented by the defendant indicating that Roberta Dahl, in her letter of September 1963 to Attorney Jacobson, had not been truthful.

In rebuttal, Mrs. Ann Dahl, the mother of Roberta Dahl, testified that she did not know nor had ever heard of the defendant prior to May of 1963; that she had never taken her daughter to the defendant for professional treatment; that she had never referred anyone to the defend-

ant for treatment of social diseases; and that she did not make arrangements for treatment by him of Patricia Hanley in April 1963.

In surrebuttal Attorney Jacobson testified that when he had conferred with Mrs. Ann Dahl and Roberta Dahl in Minneapolis on the occasion of retaining Attorney Meshbecher to represent Roberta that Mrs. Dahl had advised him that she had known the defendant in the past and that he had treated her; that she had telephoned the defendant and made the arrangements for him to treat Patricia Hanley in April 1963.

REASONS FOR NOT GRANTING WRIT

The keystone requirement to be met before the jurisdiction of the United States Supreme Court may be invoked via a grant of the writ of certiorari in cases from state courts is the presentation of a substantial federal question. A title, right, privilege or immunity of federal constitutional dimension must be asserted as a condition precedent to consideration.

28 U. S. C. § 1257 (3);

Rice v. Sioux City Cemetery, (1954) 349 U. S. 70, 99 L. E. 897, 75 S. C. 614;

Williams v. Kaiser, (1945) 323 U. S. 471, 89 L. E. 398, 65 S. C. 363;

Tomkins v. Missouri, (1945) 323 U. S. 485, 89 L. E. 407, 65 S. C. 370;

Reynolds v. Cochran, (1961) 365 U. S. 525, 5 L. E. (2d) 754, 81 S. C. 723.

The issue brought on appeal to the Supreme Court of Wisconsin by the defendant-petitioner was a challenge to the legal sufficiency of the evidence adduced against him at his trial. A resolution of the issue by the Wisconsin Supreme Court (Appendix A of Brief of the Petitioner) involved a review of the evidence and the interpretation and application of extant state law. No resort to federal authority was necessary and no discussion of any question of federal dimension was had in the opinion. It may be recited as a principle of general application that challenges to the sufficiency of the evidence and the credibility of the witnesses in state criminal actions are issues uniquely resolved by the application of state law and beyond the pale of federal analysis, at least under any construction of the Fourteenth Amendment due process clause had heretofore. Traditionally the United States Supreme Court does not grant a writ of certiorari to review evidence, *United States v. Johnson,* (1925) 268 U. S. 220, 69 L. E. 925, 45 S. C. 496, especially where, as in the case at bar, the trial court has been sustained on appeal, *Graver Mfg. Co. v. Linde Co.,* (1949) 336 U. S. 271, 93 L. E. 672, 69 S. C. 535. There appears no reason for a departure from that traditional position in the instant case.

CONCLUSION

The petitioner, having failed to raise a question of federal constitutional magnitude and the opinion of the Wisconsin Supreme Court not containing any substantial federal question, it is respectfully submitted that a writ of certiorari should not be granted.

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